

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 21

SOLE TECHNOLOGY, INC.

Employer

and

Case 21-RC-20855

GENERAL TRUCK DRIVERS, OFFICE,  
FOOD, AND WAREHOUSE UNION,  
TEAMSTERS LOCAL 952, INTERNATIONAL  
BROTHERHOOD OF TEAMSTERS<sup>1</sup>

**DECISION AND DIRECTION OF ELECTION**

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board, hereinafter referred to as the Board. Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned. Upon the entire record in this proceeding, the undersigned makes the following findings and conclusions:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.
3. Petitioner is a labor organization within the meaning of Section 2(5) of the Act, and seeks to represent certain employees of the Employer.

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<sup>1</sup> The Petitioner's name appears as amended at the hearing.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. The following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time apparel and footwear warehouse and shipping employees including leads known as supervisors; excluding all other employees, office clerical employees, guards, and supervisors as defined in the Act.

## **I. SUMMARY AND CONCLUSION**

The Employer, Sole Technology, Inc., is a California corporation engaged in the business of the manufacture and distribution of shoes and apparel at facilities located in Lake Forest, California. The Petitioner filed the instant petition seeking to represent the warehouse and shipping employees employed by the Employer. The Employer is seeking to include temporary employees supplied by four temporary employment agencies. The Petitioner contends that the unit sought by the Employer is inappropriate because under the Board's holding in Dana Corporation, Case 32-RC-5370 and Oakwood Care Center, 343 NLRB No. 76 (2004), the temporary employees cannot be joined in the unit unless all parties consent, and the Petitioner and the temporary agencies do not consent. Furthermore, the Petitioner asserts that the unit sought by the Employer is inappropriate in any event because the temporary employees and the regular employees do not share a sufficient community of interest.

Based on the record as a whole and the Employer's brief, I find that the temporary employees should be excluded from the unit, as consent has not been attained from all parties. Accordingly, I shall direct an election be held in the petitioned-for unit.

Below, I have set forth the record evidence concerning the Employer's operations, including evidence concerning the temporary employees. Following the presentation of the evidence, I have set forth a section applying the Board's legal standards to the evidence. The decision concludes with a direction of election and the procedures for requesting review of this decision.

## **II. RECORD EVIDENCE**

The Employer staffs its warehouses using a combination of regular and temporary employees. The Employer utilizes four temporary employment agencies to supply its temporary workforce: Remedy, Volt, KIMKO, and Westaff. The Employer employs approximately 55 regular employees and 71 temporary employees. After a temporary employee works 480 to 520 hours, he can apply to be converted to regular employee status. Following a successful evaluation by the Employer's managers, the temporary employee is converted to regular employee status.<sup>2</sup> Since 2001, all of the Employer's regular employees have come from the temporary worker pool.

The Employer has contracts with the various temporary agencies that are renewed annually. The temporary agencies initially locate and hire all of the temporary employees based on requirements specified by the Employer, and are responsible for paying the employees. The Employer directs the day-to-day supervision of the

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<sup>2</sup> The number of hours required to be converted to regular employee status vary based on which temporary agency supplied the employee to the Employer.

temporary employees, determines their work schedules, and provides some employee benefits.

### **III. ANALYSIS**

In Oakwood Care Center, 343 NLRB No. 76 (2004), the Board overruled M.B. Sturgis, 331 NLRB 1298 (2000), and returned to prior precedent, holding that combined units of solely and jointly employed employees are multi-employer units and are statutorily permissible only with the parties' consent. The required consent must be clear and unequivocal, as manifested by express agreement or by actually entering into bargaining on a multi-employer basis. Employer consent will not be inferred from the joint employer relationship. Greenhoot, Inc., 205 NLRB 250, 251 (1973).

Here, the Employer is seeking such a multi-employer unit. The unit sought by the Employer would be composed of both regular employees employed solely by the Employer, and temporary employees jointly employed by the Employer and one of the four temporary agencies.

As the Employer is seeking to combine solely and jointly employed employees into a single bargaining unit, the facts of this case fit squarely within the holding of Oakwood. The Petitioner has unequivocally stated that it is opposed to the inclusion of the temporary workers in the unit. Further, the four temporary agencies have not given clear and unequivocal consent to the inclusion of the temporary employees into the unit. Thus, under present Board law, the unit sought by the Employer is impermissible because the requisite consent of all parties is absent.

In its brief, the Employer argues, among other things, that the Board should overrule Oakwood. Since Oakwood was decided, the Board has reaffirmed the Oakwood holding, *sub silentio*, in Dana Corporation, 32-RC-5370 (October 12, 2005). The decision whether to overrule Board precedent is the exclusive prerogative of the Board itself, or the Supreme Court. Insurance Agents' International Union, 119 NLRB 768, 772-773 (1957), enf. denied, 260 F.2d 736 (D.C. Cir. 1958), aff'd, 361 U.S. 477 (1960).

In light of my conclusion that the temporary workers should be excluded from the unit, it is unnecessary to determine whether or not the regular and temporary workers share a sufficient community of interest to otherwise be included within a single bargaining unit.

#### **IV. CONCLUSION**

Based on the foregoing and the record as a whole, I find that the temporary workers should be excluded from the petitioned-for unit. Accordingly, I shall direct an election in the following appropriate unit (hereinafter "Unit"):

All full-time and regular part-time apparel and footwear warehouse and shipping employees including leads known as supervisors; excluding temporary employees, all other employees, office clerical employees, guards, and supervisors as defined by the Act.

There are approximately 55 employees in the Unit found appropriate.

#### **DIRECTION OF ELECTION**

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the Notice of Election to be issued subsequently, subject to the Board's Rules and Regulations.

Eligible to vote are those in the unit who are employed during the payroll period ending

immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike, which commenced less than 12 months before the election date, employees engaged in such strike that have retained their status as strikers but who have been permanently replaced, as well as their replacements are eligible to vote. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective-bargaining purposes by the **General Truck Drivers, Office, Food & Warehouse Union, Teamsters Local 952, International Brotherhood of Teamsters.**

### **LIST OF VOTERS**

In order to ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. Excelsior Underwear, Inc., 156 NLRB 1236 (1966); NLRB v. Wyman-Gordon Company, 394 U.S. 759 (1969). Accordingly, it is hereby directed that

within 7 days of the date of this Decision, two copies of an alphabetized election eligibility list, containing the full names and addresses of all eligible voters shall be filed by the Employer with the undersigned, who shall make the list available to all parties to the election. North Macon Health Care Facility, 315 NLRB 359 (1994).

In order to be timely filed, such list must be received in Region 21, 888 South Figueroa Street, 9th Floor, Los Angeles, CA 90017, **on or before November 25, 2005**. No extension of time to file the list shall be granted, excepted in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed. The list may be submitted by facsimile transmission to (213) 894-2778. Since the list is to be made available to all parties to the election, please furnish a total of four copies, unless the list is submitted by facsimile, in which case, only one copy need be submitted.

### **NOTICE OF POSTING OBLIGATIONS**

According to Board Rules and Regulations, Section 103.21, Notices of Election must be posted in areas conspicuous to potential voters for a minimum of three (3) working days prior to the day of the election. Failure to follow the posting requirement may result in additional litigation should proper objections to the election be filed. Section 103.20(c) of the Board's Rules and Regulations requires an employer notify the Board at least five (5) full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. Club Demonstration Services, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the election notice.

## **RIGHT TO REQUEST REVIEW**

Under the provision of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570. The Board in Washington must receive this request by 5:00 p.m. **on December 2, 2005.** This request may **not** be filed by facsimile.

In the Regional Office's initial correspondence, the parties were advised that the National Labor Relations Board has expanded the list of permissible documents that may be electronically filed with its offices. If a party wishes to file the above-described document electronically, please refer to the Attachment supplied with the Regional Office's initial correspondence for guidance in doing so. The guidance can also be found under "E-Gov" on the National Labor Relations Board web site: [www.nlrb.gov](http://www.nlrb.gov).

**DATED** at Los Angeles, California, this **18<sup>th</sup>** day of November 2005.

/s/Victoria E. Aguayo  
Victoria E. Aguayo  
Regional Director, Region 21  
National Labor Relations Board